

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

XAVIER L. BURTON,

Defendant-Appellant.

UNPUBLISHED

January 20, 2004

No. 230894

Wayne Circuit Court

LC No. 99-007272

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

XAVIER BURTON,

Defendant-Appellee.

No. 239185

Wayne Circuit Court

LC No. 99-007272

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

XAVIER BURTON,

Defendant-Appellee.

No. 245627

Wayne Circuit Court

LC No. 99-007272

Before: Gage, P.J., and White and Cooper, JJ.

Gage, P.J. (*dissenting*).

I respectfully dissent from the majority's conclusion that a new trial is required in this case because of the prosecutor's conduct during closing arguments. After reviewing the prosecutor's comments in context and as they relate to defense counsel's closing argument, I

simply cannot agree that the prosecutor's comments were so egregious that they denied defendant an impartial trial.

At the outset, I reiterate that defendant failed to object to the prosecutor's comments at trial. A trial court can grant a new trial on any ground that would support appellate reversal, or if it believes the verdict resulted in a miscarriage of justice. MCR 6.431(B). Appellate review is precluded where the defendant failed to timely and specifically object; instead, appellate review is for plain error. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Reversal is warranted only when "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Barber*, *supra* at 296, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant primarily takes issue with the prosecutor's comments made during his rebuttal argument. Defendant argues, and the majority agrees, that during his argument, the prosecutor improperly personally attacked defense counsel's intelligence and argued that defense counsel intentionally attempted to mislead the jury because he knew his client was guilty.

The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.* Most importantly, a prosecutor need not use the least prejudicial evidence available to establish a fact in issue, nor must he state the inferences in the blandest terms possible. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Accordingly, as noted by the majority, a prosecutor need not use the blandest of all possible terms during closing arguments. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Thus, in order to properly review the prosecutor's comments, defense counsel's argument must be reviewed. Defense counsel began his closing argument by asserting that the prosecutor merely brought forth a story, while defense counsel would deal only with the facts. In particular, defense counsel stated:

Now, one of the things that Mr. Dorsey did was he brought you a story. See, I'm not going to bring you a story. I'm going to deal with the facts. . . . Mr. Dorsey came in here and I'm just going to point some things out to you. He said that my client put his hands over his head and went walking through the pool, touching people, looking for his friend. You remember that. That's the way his first story read. Okay? But look at that. We didn't come here to hear a story. We came here to look at the facts. Now when I came to you, I didn't tell you a story.

Defense counsel used the remainder of his closing argument to point out inconsistencies the defense perceived in the witness testimony relied on by the prosecutor.

A review of the above demonstrates that it was defense counsel who initially accused the prosecutor of merely telling a story and not relying on the particular facts of this case. In essence, defense counsel suggested the prosecutor's argument was based on fabrication. On that basis, a review of the prosecutor's argument demonstrates that the majority of the prosecutor's

comments were made in response to defense counsel's assertion of fabrication. The prosecutor's comments such as "if all you have is nothing, make as much noise as you can with nothing," addressed the evidence presented in this case. A prosecutor may not comment on a defendant's failure to present evidence, but may argue that certain evidence is uncontradicted. See *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). Read in context, the prosecutor's comment merely referred to the evidence weighing against defendant – i.e., multiple witnesses identified defendant as the perpetrator of the assault. Defense counsel argued during his closing argument that there were many inconsistencies in the witness testimony; in response, the prosecutor contended that rather than being inconsistent, the child witnesses misunderstood the questions being asked. Thus, the prosecutor's comments were interpretations of the evidence and responses to defense counsel's assertions.

While at first glance, the prosecutor's comment that "many of [defense counsel's] comments were so unintelligent, I couldn't understand them" appears to be a personal attack on defense counsel, the comment must be read in context. Again, the prosecutor made this comment in response to defense counsel's argument that the witness testimony conflicted and to explain that defense counsel's questions may have confused the child witnesses. While the prosecutor could have used blander terms, the prosecutor's comments should not be viewed as an attempt to attack defense counsel's credibility or an attempt to argue that defense counsel was trying to mislead the jury. See *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Instead, the prosecutor's comments should be viewed as an attempt to argue the facts in evidence and explain why it may have appeared that there were inconsistencies in the witness testimony.

In responding to defense counsel's argument, the prosecutor commented "that's because [defense counsel] knows his client was identified and his client is the person who committed this offense." I recognize that this statement is troubling. It has been long held that a prosecutor's comments that defense counsel is attempting to mislead the jury or that defense counsel does not believe his own client, undermine the defendant's presumption of innocence and impermissibly shift the focus from the evidence itself to defense counsel's personality. See *People v Dalessandro*, 165 Mich App 569, 579-580; 419 NW2d 609 (1988), quoting *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). However, again, when read in context, this comment responded to the evidence presented.

Regardless, defendant failed to preserve this issue at trial with the proper objection. If defense counsel had objected to the comments made by the prosecutor, a curative instruction could have been given. Contrary to the majority's conclusion, I cannot agree that an instruction to the jury would have served to only highlight the comments without curing the error. Instead, a prompt objection at the beginning of the prosecution's argument could have served as a warning and cured any future errors. Further, the court could have instructed the jury to disregard the offending statements. However, even without a curative instruction, I simply do not agree that any of the prosecutor's comments so impacted the jury that they worked to deny defendant a fair trial and his presumption of innocence. There is no miscarriage of justice.

I note that while a prosecutor's job is to seek justice and not merely to convict a defendant, a prosecutor cannot be so limited in his argument that his presence at trial is of no import. A prosecutor must be able to effectively respond to the defense counsel's argument and the evidence presented at the trial. "The prosecutor is, after all, an advocate and he has not only

the right but the duty to vigorously argue the people's case." *People v Cowell*, 44 Mich App 623, 629; 205 NW2d 600 (1973). "Criminal trials are adversary proceedings, not social affairs." *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). In this case, none of the prosecutor's comments undermined defendant's presumption of innocence, nor did they shift the focus away from the evidence and deny defendant a fair trial. I would find that the trial court abused its discretion in granting defendant a new trial on the basis of prosecutorial misconduct.

/s/ Hilda R. Gage